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JAMES H. McKENNEY,

Supreme Court of the United States.

Ex parte.

IN THE MATTER

OF

THE PETITION OF THE CHRISTENSEN ENGINEERING COMPANY PRAYING FOR A WRIT OF MANDAMUS.

PETITION

of Christensen Engineering Company for Mandamus to Circuit Court of Appeals, Second Circuit.

OPINION OF CIRCUIT COURT OF APPEALS.

WM. A. JENNER,
Of Counsel for Petitioner,
34 PINE STREET,
New York.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

Ex Parte

IN THE MATTER

OF

The Petition of the CHRISTENSEN ENGINEERING COMPANY praying for a writ of mandamus.

And now into this Honorable Court, by its counsel William A. Jenner, comes the Christensen Engineering Company, a corporation organized and existing under the laws of the State of Wisconsin, and respectfully asks leave of the court to file a petition herewith exhibited, for a writ of mandamus to the United States Circuit Court of Appeals for the Second Circuit, and prays the Court to direct a rule to be issued to the said United States Circuit Court of Appeals for the Second Circuit, to show cause on a day to be fixed by the court why a writ of mandamus should not issue commanding said Circuit Court of Appeals for the Second Circuit to reinstate and take jurisdiction of the petitioner's writ of error and consider and determine the same on the merits as prayed for, and the petitioner prays such other relief as may be just.

Dated, New York, February 25th, 1904.

WM. A. JENNER
Counsel for Petitioner.

5 **Petition.**

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
The Petition of the CHRISTENSEN ENGINEERING COMPANY praying for
6 a writ of mandamus.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The petition of the Christensen Engineering Company respectfully shows:—

I. That it is a corporation organized and existing under and by virtue of the laws of the State of Wis-
7 consin and has its principal place of business at Milwaukee in said State.

II. And your petitioner further shows, on information and belief, that on or about the 13th day of August, 1900 a bill of complaint in equity was filed against your petitioner by the Westinghouse Air Brake Company in the Circuit Court of the United States for the Southern District of New York wherein and whereby the said complainant alleged, among other
8 things, that it was a corporation incorporated under the laws of the State of Pennsylvania; that your petitioner, the defendant therein named, was a corporation organized under the laws of the State of Wisconsin but with an office within the Southern District of New Yark; that said complainant was the owner of certain Letters Patent issued to George A. Boyden No. 481,134, dated August 16th, 1892 for an improvement in air brakes; that your petitioner, the defendant therein, had infringed the said Letters Patent

by making, using and selling the said patented device within said Southern District of New York, and praying a preliminary and permanent injunction against your petitioner, the defendant therein, restraining such infringement and for an accounting of profits and damages.

III. That your petitioner duly appeared in said suit by Wetmore & Jenner, its solicitors, and answered the said bill of complaint, to which replication was duly filed.

IV. Upon information and belief that thereafter, upon the motion of the said Westinghouse Air Brake Company, complainant in said suit, and upon affidavits filed, and after hearing counsel on both sides, the said Circuit Court, Hon. E. HENRY LACOMBE, Circuit Judge, presiding, made an order, entered on the 18th day of October, 1901, that a preliminary injunction issue out of and under the seal of the said court, directed to your petitioner, the Christensen Engineering Company, defendant therein, its directors, officers, &c., restraining them and each of them until the further order of the court from making, using or selling any apparatus embodying the invention of claim 2 of said Letters Patent No. 481,134, and that all questions as to the infringement of claims 4 and 11 of said Letters Patent be reserved for final hearing.

V. That as your petitioner is now informed and believes a writ of injunction in accordance with said order was issued out of the said court on the 21st day of October, 1901, but as your petitioner has contended and still contends the said writ of injunction has never been served upon it.

VI. Upon information and belief that thereafter and on February 21st, 1903 the said Circuit Court of the United States for the Southern District of New York,

upon the application of said Westinghouse Air Brake Company, complainant in said suit, and upon divers affidavits presented to the said court, and after hearing counsel in support of the application and in opposition thereto, by a judgment or order filed said February 21st, 1903 ordered, adjudged and decreed that your petitioner, the Christensen Engineering Company, the defendant in said suit, was guilty of contempt of said Circuit Court in having disobeyed the said order entered on the 18th day of October, 1901 and the injunction issued by said court thereunder on October 21st, 1901, in that since the date of the entry of the said order and the date of the service of said injunction it had sold and delivered to the Boston and Maine Railroad Company four triple valves which were an infringement of claim 2 of said Letters Patent No. 481,-134, and further ordering, adjudging and decreeing that for said misconduct your petitioner, the Christensen Engineering Company, the defendant therein, be thereby fined the sum of One thousand dollars, Five hundred of which was adjudged to be paid to the United States of America through the clerk of said court, and Five hundred dollars to be paid to the complainont, the Westinghouse Air Brake Company within twenty days from the entry thereof, which judgment was entered in the office of the clerk of said Circuit Court on February 21st, 1903.

VII. Thereafter your petitioner feeling itself aggrieved by said judgment or order entered February 21st, 1903, petitioned the said Circuit Court for the Southern District of New York for an order allowing it, your petitioner, to prosecute a writ of error to the said United States Circuit Court of Appeals, for the Second Circuit, according to the laws of the United States in that behalf, and that an order be made fixing the amount of the security which the defendant should give, and, upon giving which, that all further proceed-

17

ings in said Circuit Court be suspended and stayed until the determination of said writ of error.

VIII. That the aforesaid petition was granted and the writ of error prayed for was allowed and was issued out of said Circuit Court on the 23rd day of March, 1903, duly tested, and a true and complete transcript of the record and proceedings had in said Circuit Court in the cause of Christensen Engineering Company as plaintiff in error against the Westinghouse Air Brake Company as defendant in error as the same were of record and on file in the office of the clerk of said Circuit Court was duly certified by the clerk of said Circuit Court to the said United States Circuit Court of Appeals, for the Second Circuit.

18

IX. That thereafter the said writ of error came on for argument in the said Circuit Court of Appeals, for the Second Circuit, and was heard on the 14th day of December, 1903 by the said Circuit Court of Appeals, the Hon. Wm. A. Wallace, Wm. K. Townsend, Alfred C. Coxe, Circuit Judges sitting, and thereafter on the 13th day of February, 1904, the said Circuit Court of Appeals filed an opinion or decision, a copy of which is hereto annexed, and your petitioner prays that the same may be considered as a part of this petition. Therein the said Circuit Court of Appeals holds, for the reasons therein stated, that it has no jurisdiction to entertain or consider your petitioner's said writ of error, being constrained to that conclusion as your petitioner understands the said opinion or decision by the views of your Honorable Court as expressed in the case of *in Re* Debs, reported in 158 U. S. 564, 573.

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X. Your petitioner further shows that the said suit, above mentioned in clause II of this petition, being at issue, testimony was taken on behalf of the respective parties and the same came on for hearing in the

said Circuit Court and was heard by the Hon. HOYT H. WHEELER, District Judge sitting as Circuit Judge, and was decided by him and an interlocutory decree was entered in said suit on the 18th day of March, 1903 sustaining the validity of said Letters Patent and claim 2, and also claims 4 and 11 thereof, which by said order granting a preliminary injunction had been reserved for final hearing, that your petitioner, the de-
22 fendant therein, had infringed the same and directing a permanent injunction and an accounting of profits and damages.

XI. That thereafter your petitioner, the defendant therein, feeling itself aggrieved by the said interlocutory decree sued out an appeal therefrom to the said Circuit Court of Appeals, for the Second Circuit, on the 16th day of April 1903, which was decided by said Circuit Court of Appeals on the 27th day of January,
23 1904 by an opinion or decision filed on that day, whereby the 2nd claim of said Letters Patent, being the claim as to which the injunction aforesaid was issued, was held to be invalid, but claims 4 and 11 were held to be valid and infringed. Thereafter and on the 4th day of February, 1904, your petitioner, the defendant in said suit, filed a petition for a rehearing of said appeal, and the Westinghouse Air Brake Company, the complainant in said suit, also, on the same day, filed a petition for a rehearing of said appeal,
24 which petitions are now, as your petitioner is informed and believes, held by the said court under advisement and awaiting its decision.

XII. Your petitioner further shows that it is advised and believes and therefore states the fact to be that the said judgment fining your petitioner One thousand dollars for contempt as aforesaid of the said order entered the 18th day of October, 1901, and of the said writ of injunction issued the 21st day of October, 1901, one-

half payable to the United States and one-half to the complainant in said suit was a final judgment reviewable only by writ of error to said Circuit Court of Appeals, and that unless said Circuit Court of Appeals shall take jurisdiction of your petitioner's said writ of error and consider and determine the same upon the merits thereof your petitioner is without remedy.

WHEREFORE, your petitioner prays that a writ of mandamus be granted by this Honorable Court commanding the said Honorable United States Circuit Court of Appeals, for the Second Circuit, to reinstate and take jurisdiction of your petitioner's said writ of error and to entertain and consider the merits thereof and decide the same upon the merits and for such other relief as may be just.

And your petitioner will ever pray, &c.

CHRISTENSEN ENGINEERING CO.
per S. W. WATKINS,
President.

STATE OF WISCONSIN,
Eastern District of Wisconsin, } ss:
CITY OF MILWAUKEE,

SAMUEL W. WATKINS, being duly sworn, says that he is the President of the Christensen Engineering Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

SAMUEL W. WATKINS.

Sworn to before me, this 18th day of February, 1904.

CHAS. L. GOSS
Notary Public
Milwaukee County,
Wisconsin.

(SEAL)

29 **Petition.**

STATE OF NEW YORK,
Southern District of New York } ss.:
CITY AND COUNTY OF NEW YORK

WILLIAM A. JENNER being duly sworn, says: That he is an attorney and counselor at law and is one of the solicitors for the Christensen Engineering Company, the petitioner above named; that he has read the foregoing petition and knows the contents thereof,
30 and that the matters of fact therein alleged are true of his own knowledge.

Deponent further states that on the 25th day of February, 1904 the said Circuit Court of Appeals for the Second Circuit made an order dismissing the writ of error of the said petitioner referred to in the foregoing petition but without affirming or reversing the order or judgment of the court below.

WM. A. JENNER.

Sworn to before me, this 25th
31 day of February, 1904

GRACE A. TAYLOR
(SEAL) Notary Public,
N. Y. Co.

32

Opinion of Circuit Court of Appeals. 33

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE CHRISTENSEN ENGINEERING COMPANY,
Plaintiff in Error, 34

vs.

THE WESTINGHOUSE AIR BRAKE COMPANY,
Defendant in Error.

Before WALLACE, TOWNSEND and COXE, Circuit Judges.

WALLACE, Circuit Judge:—

This is a writ of error to review an order of the 35
court below adjudging the defendant in an equity suit brought to restrain the infringement of a patent guilty of contempt for violating an interlocutory injunction restraining such infringement.

This court has decided that such an order cannot be re-examined here unless upon an appeal from a final decree in the cause. If it can be reviewed in the court in which it was made at the final hearing of the cause, it is not a "final decision" within the meaning of Section 6 of the act conferring jurisdiction upon 36
this court. We reviewed such an order in Gould vs. Sessions (67 Fed. Rep., 163) but that case was decided before the decision of the Supreme Court in *Re* Debs (158 U. S., 564, 573). After the decision in *Re* Debs the question arose again in Nassau Electric R. Co. vs. Sprague Electric Co. (95 Fed. Rep., 415) and we dismissed the writ of error with this observation: "Upon the authority of the Debs case we are constrained to hold that the order cannot be reviewed ex-

37 **Opinion of Circuit Court of Appeals.**

cept upon an appeal from the final decree in the cause." In Cary Manufacturing Company vs. Acme Company (108 Fed. Rep., 873), we reviewed on writ of error an order imposing a fine upon the defendant in an equity suit for the violation of an injunction. The injunction however was not interlocutory, but was granted by the final decree. This circumstance was not referred to in the opinion, but explains the apparent conflict between
38 the decision and that in Nassau Electric R. Co. vs. Sprague Electric Co. The order was final in the sense that it was a judgment in a criminal case which was independent of and separate from the original suit, and which could not be reviewed on an appeal from the final decree in that suit. *Ex Parte* Kearney (7 Wheat., 38): New Orleans vs. Steamship Co., (20 Wall., 387, 392). In Butler vs. Fayerweather (63 U. S. App., 120), the question whether an order like the present could be reviewed by this court was not involved. The order
39 reviewed there was made in a cause to which the plaintiff in error was not a party, and committed him for his refusal to answer certain questions propounded to him as a witness; and the decision was placed upon the ground that in such a case the aggrieved party "has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made."

Whether the present order can be re-examined at the final hearing of the cause, at which time all previous
40 interlocutory orders are open for review, is a question which we are not now called upon to decide. Unless it can, there can of course be no review by an appeal from the final decree. In Worden vs. Searles (121 U. S., 14), an equity cause to restrain the infringement of a patent, two orders fining the defendant for contempt for the violation of a preliminary injunction were reviewed and reversed upon an appeal from the final decree. In that case however the court regarded the orders as only nominally proceedings in contempt.

The hardship of compelling a party to wait until he can appeal from a final decree to obtain a review, especially in cases in which the defendant has been committed and is suffering imprisonment, is manifest; and we should be glad to be able to see our way clear to depart from our former decision. That decision however was constrained by the decision in the Debs case, and the Debs case is an authority which cannot be disregarded. This was an equity cause in which some of the defendants were adjudged guilty of contempt for the violation of a preliminary injunction and sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a writ of error and also for one of *habeas corpus*. The court denied the writ of error, and it is stated by the reporter that it was denied "upon the ground that the order of the Circuit Court was not a final judgment or decree." When the application was made the act establishing Circuit Courts of Appeal (Section 5) authorized the Supreme Court to review by writ of error convictions in cases of infamous crime; and if the denial had been placed upon the ground that the case was not one of a conviction for infamous crime, and therefore was reviewable only upon a certificate of division of opinion, there would have been no conflict between the decision and and that in New Orleans vs. Steamship Co., (2 Wall., 387) in which the court held that contempt of court is a criminal offence, and the imposition of a fine is a judgment in a criminal case. We are not at liberty to assume that the Supreme Court overlooked its former decision in New Orleans vs. Steamship Co., or that its reporter incorrectly reported the later decision.

The writ of error is dismissed.

A true copy,

[SEAL] WM. PARKIN,
Clerk.

Supreme Court of the United

In re

IN THE MATTER

OF

THE PETITION OF THE CHRISTENSEN REGISTERING COMPANY PRAYING FOR A WRIT OF MANDAMUS.

Brief for Christensen Registering Company in Support its Petition for Mandamus.

WM. A. JENNER,
Of Counsel for Petitioner,
54 Pine Street,
New York.

C. S. Stratton, Walter and Union Streets, N. Y.

Supreme Court of the United States.

Ex parte

IN THE MATTER

OF

The Petition of the CHRISTENSEN ENGINEERING COMPANY, praying for a writ of mandamus.

Brief for Christensen Engineering Company to Support its Petition for Mandamus.

Petition asks for a mandamus to the Circuit Court of Appeals for the Second Circuit, commanding it to reinstate petitioner's writ of error, to take jurisdiction thereof, and consider and determine the same on its merits.

We believe the merits of said writ of error are not here for review, and the proceedings in the Court below are referred to only to show the *status* of the case, and how the question here arises.

The question arises as follows: The Christensen Engineering Co. being sued in equity for infringement of a patent, a preliminary injunction was issued enjoining it from infringing claim 2 of the patent (see Petition, par. IV. and V.). For an alleged disobedience of the injunction, the Circuit Court fined the petitioner $1,000, $500 of which was ordered to be paid to the

Clerk of the Court, presumably for the use of the Government, and $500 to the complainant in the suit, but not, at least expressly. by way of damages or indemnity, though it may have been so intended (Pet., par. VI.).

The petitioner sued out a writ of error to the Circuit Court of Appeals (Pet., par. VII. and VIII.) After a hearing that Court dismissed the writ, without any consideration of the merits, on the ground that it had no jurisdiction of the writ (Pet., par. IX.), and without either affirming or reversing the order or judgment of the Circuit Court (See Affit. of Counsel, fol. 30 of Petition). The opinion is annexed to the petition and discloses that lack of jurisdiction was the *sole* ground of the dismissal.

The Circuit Court of Appeals was, in its own words, "constrained" to dismiss the writ under the authority of *In re Debbs*, 158 U. S., 564, although it had previously taken jurisdiction of a similar writ under the authority of *New Orleans vs. Steamship Co.*, 20 Wall., 387, and yet *In re Debbs* does not purport to overrule *New Orleans vs. Steamship Co.*, nor even refers to it, and, as we think, the two cases are consistent.

We may concede that if the Circuit Court's order or judgment fining for contempt was not *final*, but intermediate, and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed. If, however, it was *final*, then the Circuit Court of Appeals should have entertained our writ of error, and that Court substantially so concedes. But under the ruling in *New Orleans vs. Steamship Co.*, as understood by the Circuit Court of Appeals in deciding cases earlier than the one at bar, and by the Supreme Court in later cases, the fining order or judgment, to review which our writ of error is taken, *is* final, because it is not within the class of cases considered in *Worden vs. Searles*, 121 U. S., 14, and is not within that class, because the case at bar is one where the fine is payable—a moiety to the Government and a moiety to the

complainant, the latter not as damages—and therefore, in the case at bar, the fining judgment lacks the feature by which this Court in *Worden vs. Searles* distinguished the order from the judgment in *New Orleans vs. Steamship Co.*, and held it to be reviewable on appeal with the final decree.

The Circuit Court of Appeals is not committed to the view that the fining order in the case at bar can be reviewed with the final decree; on the contrary, it *expressly* reserves that question until it is presented, but it mentions the distinction by which *Worden vs. Searles* was distinguished from *New Orleans vs. Steamship Co.* (see Opinion, fol. 40), which distinction, if applied to the order at bar, would forbid its review on appeal from the final decree.

If the Circuit Court of Appeals has no jurisdiction to entertain petitioner's writ of error, and if the fining order or judgment is not within the class of cases considered in *Worden vs. Searles*, so that the same may be reviewed on appeal from a final decree, then the petitioner is without any remedy and cannot have any review by any Court of the fining judgment by which it is aggrieved.

The perplexity, if it be such, of the Circuit Court of Appeals, or its denial of our claim to review, if there be no perplexity, arises from what we believe to be a misunderstanding of the ruling of this Court in the *Debbs* case. But if the misunderstanding be that of counsel rather than of the Court, the question presented by the petition is important generally, as well to the petitioner, because it affects the liberty and the property of the citizen in a peculiar manner, and exposes him to be deprived of both by the *unreviewable* power of a single judge.

By Section 725, United States Revised Statutes, Circuit Courts have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their

authority." Such power extends to the disobedience by any party or other person "to any lawful writ, process, order, rule, decree, or command of said courts."

By Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (U. S. Stat. at L., Vol. 26, Chap. 517), that Court may review by appeal or by writ of error *final* decisions in the Circuit Courts "in all cases" other than those mentioned in the preceding section, which exceptions are not relevant to the present question. Therefore, it may review a judgment fining for contempt if that judgment is *final.*

A criminal contempt is a misdemeanor at common law and was punishable as such by common law courts without the aid of statutes. Section 725 makes a criminal contempt a misdemeanor by prescribing the punishment of fine or imprisonment, although it does not call it one, and a misdemeanor is a crime.

"As a general rule the grade of the offense is determined by the nature of the punishment prescribed."

People vs. Lyon, 99 N. Y., 216.

Misdemeanors include all crimes less than felonies.

This Court has repeatedly held contempt to be a crime.

In *ex parte Kearney*, 7 Wheat., 38, the petitioner moved for a *habeas corpus* to bring up the body of Kearney, then in custody under a commitment for an alleged contempt in refusing to answer certain questions. This Court held that it had no jurisdiction to issue the writ, "for when a Court commits a party for a contempt their adjudication is a conviction, and their commitment in consequence is execution" (p. 43).

In *New Orleans vs. Steamship Co.*, 20 Wall., 387, the Steamship Co. had filed a bill against the city for an injunction restraining the city's further interference with its property and for damages. The injunction was violated. The company then obtained a rule to show cause why the Mayor should not be punished for contempt. It does not appear that the rule was prosecuted to a decision, but at the *final hearing* the Court

decreed that the Mayor should pay a fine of $300 for the contempt, and that the city should be perpetually enjoined, &c., and that the company should recover damages from the city. The fine was presumably payable to the Government. Appeal was taken from the decree. In respect of that decree the Supreme Court said (p. 392):

"The fine of $300 imposed upon the Mayor is beyond our jurisdiction. Contempt of court is *a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing."

Citing, among other cases, *ex parte* Kearney.

In *Hayes vs. Fischer*, 102 U. S., 121, the suit was on a patent in which an *interlocutory injunction* was granted. The defendant, having violated it, was fined by the Court $1,389, payable to the Clerk. Hayes sued out a writ of error. The Court said that, if the fining order was to be treated as part of what was done in the original suit, it could not be reviewed in the Supreme Court by writ of error, but only on appeal from the final decree. If it was independent and separate from the original suit, it could not be reviewed by writ of error or appeal, because the Supreme Court had no jurisdiction in criminal cases, citing *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and the writ was dismissed.

In *Worden vs. Searles*, 121 U. S., 14, the suit was in equity upon a patent. A preliminary injunction had issued, for violation of which the defendant had been found guilty of contempt, and by one order directed *to pay the plaintiff* $250 as a fine, and by another order a fine of $1,182 to the Clerk, *to be paid by him to the plaintiff for damages and costs.*

Those orders came up for review with the final decree. The Supreme Court said (p. 25):

"We have jurisdiction to review the final decree in

the suit and all interlocutory decrees and orders. These fines were directed to be paid *to the plaintiff*. We say nothing as to the lawfulness or propriety of direction. But the fines were in fact *measured by the damages the plaintiff had sustained and the expenses he had incurred*. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case *differs* therefore, from that of *Ex parte Kearney*, 7 Wheat., 39."

The Court added, emphasizing the distinction,

" So, the fact in the present case, that, though the proceedings were *nominally* those of contempt, they were *really* proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans vs. Steamship Co.*"

And the orders imposing the fines were held " under " the special circumstances of this case to be review- " able by this court under the appeal from the final " decree."

In the case at bar the order or judgment imposes a fine of $1,000, $500 payable to the clerk, presumably for the use of the Government, and $500 to the complainant in the suit (see Petition, fol. 15). The former half was plainly a punishment for a crime and was not by way of damages; the other $500 was not by way of damages, at least expressly, and if not, it was an unauthorized payment to an informer.

The case at bar, therefore, seems to lack that feature which would bring it within the rule of *Worden vs. Searles*, and that exclusion would leave it within the rule of *New Orleans vs. Steamship Co.*, or perhaps half the fining judgment would be within one case, the other half within the other case.

It is, then, to be considered whether *in re Debbs*, 158 U. S., 564, abrogated the rule of *New Orleans vs. Steamship Co.*

The opinion in the *Debbs* case constrained the Circuit Court of Appeals to decline jurisdiction of petitioner's writ of error (see *Opinion*, fol. 41 *et seq.*).

The suit was in equity to restrain obstruction of interstate commerce. A preliminary injunction was granted and violated, and the violators were proceeded against as for contempt and sentenced to imprisonment. They applied to the Supreme Court for a writ of error, also for *habeas corpus*, the main ground being that the Circuit Court as a court of equity did not have jurisdiction of the bill.

But the Supreme Court held that the Circuit Court had jurisdiction of the bill on the ground "that the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt;" and the petition for *habeas corpus* was dismissed as that for writ of error had been before (159 U. S., 251).

In the opinion the Court said (p. 599):

"The proceding by injunction is of a *civil character* and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offence committed in the course of such violation;"

The contention of Debbs was that the proceeding against him in the Circuit Court was a criminal proceeding, that it was outside of the province of equity to enjoin the commission of crimes, that a Chancellor has no criminal jurisdiction. But the Attorney-General argued that the suit was a civil suit which the Circuit Court could entertain under its chancery powers. This latter view was sustained, and the language quoted above was used with reference to that theory, and to distinguish that theory from the petitioner's position.

We suppose its import is not to be extended beyond the principle which it was intended to elucidate, and the point to which that principle was applied. The opinion does not refer to *Ex parte Kearney* or *New*

Orleans vs. Steamship Co., and it is not to be assumed that this Court intended to overrule them or qualify their reasoning or conclusions.

In the "Statement of the Case" at page 573 it is said that a writ of error taken by Debbs to the Supreme Court had been denied "on the ground that the order of the Circuit Court was not a final judgment or decree."

In 159 U. S., 251, it is noted that the writ of error was dismissed, but the ground is not stated.

In *Tinsley vs. Anderson*, 171 U. S., 101–105, the *Debbs* case is mentioned in such connection as to indicate that this Court distinguishes the ruling in the *Debbs* case from that in *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and regards the latter as still applicable to independent proceedings for contempts in the Circuit Court, including fining judgments for disobedience of preliminary injunction.

The Circuit Court of Appeals for the Second Circuit does not, however, so consider it.

Conflicting Decisions in the Circuit Courts of Appeals.

In *Sessions vs. Gould*, 63 Fed. Rep., 1001 (An. 1894), an order or judgment imposing a fine for contempt in a patent case was brought up on *appeal*. The Court held that it had jurisdiction under Section 6 of the act to establish Circuit Courts of Appeal to review a criminal judgment, but could do so only upon *writ of error*.

In *Gould vs. Sessions*, 67 Fed. Rep., 163 (An. 1895) the same Court reviewed the contempt proceedings on writ of error. The Court held that the fining order "was in effect a judgment in a criminal case" on the authority of *New Orleans vs. Steamship Co.* and the Court noticed that the fine was imposed as a fine to be paid to the government and not to enure to the benefit of the plaintiff, and distinguished *Worden vs. Searles* on that point and reversed the order.

In *Nassau Electric Ry. Co. vs. Sprague R. & M. Co.*, 95 Fed. Rep., 415 (An. 1899), a writ of error to review an order imposing a fine for a violation of the preliminary injunction in a patent case was dismissed by the same Court under the authority of the *Debbs* case, the Court being "constrained to hold that the order "cannot be reviewed except upon an appeal from the "final decree in the cause." As the latter mode of review was not then before the Court, we suppose that its intimation was not binding, and, in the present case, the Court is careful not to commit itself (fol. 40).

In *Cary Mfg. Co. vs. Acme Flexible Clasp Co.*, 108 Fed. Rep., 873 (An., 1901), the same Court entertained a writ of error to review a judgment of the Circuit Court imposing a fine for violation of an injunction. The opinion does not indicate whether the injunction was interlocutory or one granted by final decree. The opinion of the same Court in the case at bar says the latter was its character, and thus explains the apparent conflict between the decision and that in *Nassau vs. Sprague* (see Opinion, fol. 37).

Finally, the same Court in the case at bar says "the hardship of compelling a party to wait until he "can appeal from a final decree to obtain a review es- "pecially in cases in which the defendant has been "committed and is suffering imprisonment, is mani- "fest; and we should be glad to be able to see our "way clear to depart from our former decision," referring to *Nassau vs Sprague*, in which it was constrained by the authority of *In re Debbs* to deny its jurisdiction of a writ of error. But, of course, it is not commited to take jurisdiction, and cannot, when the fining judgment is brought up with the final decree, unless the case is squarely within *Worden vs. Searles*, and to be so the fining order or judgment must award the fines to the plaintiff *as damages*, which the fining order in the case at bar does not do.

In re Paquet, 114 Fed. Rep., 441 (An., 1902), the Circuit Court of Appeals for the Fifth Circuit, said, as a *possibility* that a writ of error would lie, in view of

the explanation of the *Debbs* case contained in *Tinsley vs. Anderson.*

In re Nevitt, 117 Fed. Rep., 448 (An., 1902), the Circuit Court of Appeals for the Eighth Circuit explains and comments on the difference between criminal and civil contempts, and holds that fining orders made to vindicate the authority and dignity of a Court contemned by disobedience of its order is strictly of a *criminal* and *punitive* character on the authority of *New Orleans vs. Steamship Co.*

That Court, therefore, is not, like the same Court for the Second Circuit, constrained to regard such contempts to be within the ruling of the *Debbs* case, and as of a "civil character."

The state of the authorities then on this important question is substantially as follows:

Section 725 R. S. makes disobedience of a Court's order a crime by punishing it with fine or imprisonment, hence a misdemeanor.

Ex parte Kearney held contempt of Court to be a crime, and for that reason not within the appellate jurisdiction of the Supreme Court.

New Orleans vs. Steamship Co. held similarly in a purely civil case, and, in reviewing the final decree, separated the *fining* part of it from the rest of the decree, and held that, because it is criminal in character, the Court could not review it.

Worden vs. Searles reversed orders punishing for contempt along with the final decree, because although the fining orders were *nominally* criminal, the fines for contempt were *really* awards of damages to the plaintiff, as in fact on their face they were.

It would seem, therefore, that in a case like that shown in the petition where half the fine is payable to the clerk, presumably for use of the government, and the other half to the complainant, but not as damages, the order or judgment imposing the fine is not reviewable with the final decree. If it is not, it is reviewable,

if at all, only by writ of error to the Circuit Court of Appeals under Section 6 of the Act of March 3, 1891.

The Circuit Court of Appeals for the Second Circuit took that view of it in *Gould vs. Sessions*, 67 Fed. Rep., 163, on the authority of *New Orleans vs. Steamship Co.*, but in *Nassau, &c., vs. Sprague, &c.*, 95 Fed. Rep., 415, declined jurisdiction under the authority of *In re Debbs*.

In re Debbs is construed by the Circuit Court of Appeals as overruling *ex-parte Kearney* and *New Orleans vs. Steamship Co.*, although neither of those cases are referred to in the opinion.

In *Tinsley vs. Anderson* the Supreme Court explains and apparently limits *In re Debbs*, but not so explicitly as to induce the Circuit Court of Appeals in in the present case to depart from its ruling in *Nassau, &c.; vs. Sprague*, and return to that of *Gould vs. Sessions*.

In re Paquet the Fifth Circuit intimates that *possibly* a writ of error will lie, notwithstanding the *Debbs* case, in view of *Tinsley vs. Anderson*.

In re Nevitt, the Eighth Circuit holds fining orders or judgments for disobedience of orders, inflicted to vindicate the dignity of the Court, to be criminal and punitive in character, notwithstanding the ruling in the *Debbs* case.

Under the *semble* in *Re Paquet*, the Court in the Fifth Circuit would *possibly* have taken jurisdiction of a writ of error like petitioner's.

Under the rule defining criminal contempts in *Re Nevitt*, the Court in the Eighth Circuit would, we think, certainly have taken jurisdiction of such a writ of error.

But the Court in the Second Circuit refuses to do so.

In view of the explanation of *Re Debbs* contained in *Tinsley vs. Anderson*, we believe the Court of Appeals for the Second Circuit should have considered petitioner's writ of error on the merits.

It may properly be suggested that the question presented by the petition is one of the jurisdiction of the Circuit Court of Appeals, and one where that Court for the Second Circuit has entertained on successive occasions opposing views, and, finally, a view opposite to that of the Court for the Eighth Circuit, while the Court for the Fifth Circuit regards its jurisdiction as possible. Under such circumstances, the question is of general interest as well as immediate to the petitioner.

The petition is distinguishable from that of *In re* Key, 189 U. S., 84, where this Court held that a writ of mandamus could not be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction. No such circumstances are here presented.

This Court, therefore, is respectfully urged to grant the rule prayed for or such other writ under Section 716, Revised Statutes, as may be appropriate.

WM. A. JENNER,
Of Counsel for Petitioner.

Supreme Court of the United States.

IN THE MATTER OF The Petition of the CHRISTENSEN ENGINEERING COMPANY, praying for a writ of mandamus.	No. 15, Original Oct. Term, 1903.

Brief for Christensen Engineering Company to Support its Petition for Mandamus.

The matter now arises upon the return of the rule made by this Court requiring the Circuit Court of Appeals for the Second Circuit to show cause why a mandamus should not issue as prayed for in the petition.

Petition asks for a mandamus to the Circuit Court of Appeals for the Second Circuit, commanding it to reinstate petitioner's writ of error, to take jurisdiction thereof, and consider and determine the same on its merits.

The merits of said writ of error are not here for review, and the proceedings in the Court below are referred to only to show the *status* of the case, and how the question here arises.

The question arises as follows: The Christensen Engineering Co. being sued in equity for infringement of a patent, a preliminary injunction was issued enjoin-

the injunction, the Circuit Court fined the petitioner $1,000, $500 of which was ordered to be paid to the Clerk of the Court, presumably for the use of the Government, and $500 to the complainant in the suit, but not, at least expressly, by way of damages or indemnity, though it may have been so intended (Pet., par. VI.).

The petitioner sued out a writ of error to the Circuit Court of Appeals (Pet., par. VII. and VIII.). After a hearing that Court dismissed the writ, without any consideration of the merits, on the ground that it had no jurisdiction of the writ (Pet., par. IX.), and without either affirming or reversing the order or judgment of the Circuit Court (See Affit. of Counsel, fol. 30 of Petition). The opinion is annexed to the petition and discloses that lack of jurisdiction was the *sole* ground of the dismissal.

The Circuit Court of Appeals was, in its own words, " constrained " to dismiss the writ under the authority of *In re Debs*, 158 U. S., 564, although it had previously taken jurisdiction of a similar writ under the authority of *New Orleans vs. Steamship Co.*, 20 Wall., 387, and yet *In re Debs* does not purport to overrule *New Orleans vs. Steamship Co.*, nor even refers to it, and, as we think, the two cases are consistent.

We may concede that if the Circuit Court's order or judgment fining for contempt was not *final*, but intermediate, and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed. If, however, it was *final*, then the Circuit Court of Appeals should have entertained our writ of error, and that Court substantially so concedes. But under the ruling in *New Orleans vs. Steamship Co.*, as understood by the Circuit Court of Appeals in deciding cases earlier than the one at bar, and by the Supreme Court in later cases, the fining order or judgment, to review which our writ of error is taken, *is* final, because it is not within the class of cases considered in *Worden vs. Searles*, 121 U. S., 14, and is not within that class,

because the case at bar is one where the fine is payable—a moiety to the Government and a moiety to the complainant, the latter not as damages—and therefore, in the case at bar, the fining judgment lacks the feature by which this Court in *Worden vs. Searles* distinguished the order from the judgment in *New Orleans vs. Steamship Co.*, and held it to be reviewable on appeal with the final decree.

The Circuit Court of Appeals is not committed to the view that the fining order in the case at bar can be reviewed with the final decree; on the contrary, it *expressly* reserves that question until it is presented, but it mentions the distinction by which *Worden vs. Searles* was distinguished from *New Orleans vs. Steamship Co.* (see Opinion, fol. 40), which distinction, if applied to the order at bar, would forbid its review on appeal from the final decree.

If the Circuit Court of Appeals has no jurisdiction to entertain petitioner's writ of error, and if the fining order or judgment is not within the class of cases considered in *Worden vs. Searles*, so that the same may be reviewed on appeal from a final decree, then the petitioner is without any remedy and cannot have any review by any Court of the fining judgment by which it is aggrieved.

The perplexity, if it be such, of the Circuit Court of Appeals, or its denial of our claim to review, if there be no perplexity, arises from what we believe to be a misunderstanding of the ruling of this Court in the *Debs* case. But if the misunderstanding be that of counsel rather than of the Court, the question presented by the petition is important generally, as well as to the petitioner, because it affects the liberty and the property of the citizen in a peculiar manner, and exposes him to be deprived of both by the *unreviewable* power of a single judge.

I.

By Section 725, United States Revised Statutes, Circuit Courts have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." Such power extends to the disobedience by any party or other person "to any lawful writ, process, order, rule, decree, or command of said courts."

By Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (U. S. Stat. at L., Vol. 26, Chap. 517), that Court may review by appeal or by writ of error *final* decisions in the Circuit Courts "in all cases" other than those mentioned in the preceding section, which exceptions are not relevant to the present question. Therefore, it may review a judgment fining for contempt if that judgment is *final.*

A criminal contempt is a misdemeanor at common law and was punishable as such by common law courts without the aid of statutes. Section 725 makes a criminal contempt a misdemeanor by prescribing the punishment of fine or imprisonment, although it does not call it one, and a misdemeanor is a crime.

In *Re* Acker, 66 Fed. Rep., 291, a contempt proceeding is classified as a misdemeanor.

In *Accumulator Co. vs. Consolidated, &c.*, 53 Fed. Rep., 793, it was said the same rules prevail which govern in the trial of indictments.

"As a general rule the grade of the offense is determined by the nature of the punishment prescribed."

People vs. Lyon, 99 N. Y., 216.

It has been said that contempts are divisible into civil and criminal contempts; thus in *Phillips vs. Welch*, 11 Nev., 187, 190:

"If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil and he stands committed until he complies with the order. The order in such a case is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act injurious to the other party

the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone has an interest in the enforcement of the order, and the moment he is satisfied the imprisonment terminates; in the latter the state alone is interested in the enforcement of the penalty."

But in *In re Chiles*, 22 Wall, 157, 168, this Court, referring to R. S. 725 and the power of courts thereunder to punish by fine and imprisonment for contempts of their authority consisting of disobedience of of an order, etc., says;

"The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the Court or its order, and the second to compel his performance of some act or duty required of him by the Court which he refuses to perform.

"In the former case the Court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

This Court has repeatedly held contempt to be a crime.

In *ex parte Kearney*, 7 Wheat., 38, the petitioner moved for a *habeas corpus* to bring up the body of Kearney, then in custody under a commitment for an alleged contempt in refusing to answer certain questions. This Court held that it had do jurisdiction to issue the writ, "for when a Court commits a party for a contempt their adjudication is a conviction, and their commitment in consequence is execution" (p. 43).

In *New Orleans vs. Steamship Co.*, 20 Wall., 387, the Steamship Co. had filed a bill against the city for an injunction restraining the city's further interference with its property and for damages. The injunction was violated. The company then obtained a rule to show cause why the Mayor should not be punished for contempt. It does not appear that the rule was prose-

cuted to a decision, but at the *final hearing* the Court decreed that the Mayor should pay a fine of $300 for the contempt, and that the city should be perpetually enjoined, &c., and that the company should recover damages from the city. The fine was presumably payable to the Government. Appeal was taken from the decree. In respect of that decree the Supreme Court said (p. 392):

"The fine of $300 imposed upon the Mayor is beyond our jurisdiction. Contempt of court is *a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing."

Citing, among other cases, *ex parte* Kearney.

In *Hayes vs. Fischer*, 102 U. S., 121, the suit was on a patent in which an *interlocutory injunction* was granted. The defendant, having violated it, was fined by the Court $1,389, payable to the Clerk. Hayes sued out a writ of error. The Court said that, if the fining order was to be treated as part of what was done in the original suit, it could not be reviewed in the Supreme Court by writ of error, but only on appeal from the final decree. If it was independent and separate from the original suit, it could not be reviewed by writ of error or appeal, because the Supreme Court had no jurisdiction in *criminal* cases, citing *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and the writ was dismissed.

In *Worden vs. Searles*, 121 U. S., 14, the suit was in equity upon a patent. A preliminary injunction had issued, for violation of which the defendant had been found guilty of contempt, and by one order directed *to pay the plaintiff* $250 as a fine, and by another order a fine of $1,182 to the Clerk, *to be paid by him to the plaintiff for damages and costs.*

Those orders came up for review with the final decree. The Supreme Court said (p. 25):

" We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid *to the plaintiff*. We say nothing as to the lawfulness or propriety of direction. But the fines were *in fact measured by the damages the plaintiff had sustained and the expenses he had incurred.* They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case *differs* therefore, from that of *Ex parte Kearney*, 7 Wheat., 39."

The Court added, emphasizing the distinction,

" So, the fact in the present case, that, though the proceedings were *nominally* those of contempt, they were *really* proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans vs. Steamship Co.*"

And the orders imposing the fines were held " under " the special circumstances of this case to be review- " able by this court under the appeal from the final " decree."

In the case at bar the order or judgment imposes a fine of $1,000, $500 payable to the clerk, presumably for the use of the Government, and $500 to the complainant in the suit (see Petition, fol. 15). The former half was plainly a punishment for a crime and was not by way of damages; the other $500 was not by way of damages, at least expressly, and if not, it was an unauthorized payment to an informer.

The case at bar, therefore, seems to lack that distinguishing feature which would bring it within the rule of *Worden vs. Searles*, and that exclusion would leave it within the rule of *New Orleans vs. Steamship Co.*

In *Re Swan*, 150 U. S., 637, the question arose under the So. Carolina Dispensary Act, this Court said, foot page, 652:

" Contempt of court is a specific criminal offence."

II.

It is, then, to be considered whether *in re Debs*, 158 U. S. 564, abrogated the rule of *New Orleans vs. Steamship Co.* and *Ex parte Kearney*.

The opinion in the *Debs* case constrained the Circuit Court of Appeals to decline jurisdiction of petitioner's writ of error (see *Opinion*, fol. 41 *et seq*).

The suit was in equity to restrain obstruction of interstate commerce. A preliminary injunction was granted and violated, and the violators were proceeded against as for contempt and sentenced to imprisonment. They applied to the Supreme Court for a writ of error, also for *habeas corpus*, the main ground being that the Circuit Court as a court of equity did not have jurisdiction of the bill.

But the Supreme Court held that the Circuit Court had jurisdiction of the bill on the ground " that the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt;" and the petition for *habeas corpus* was dismissed as that for writ of error had been before (159 U. S., 251).

In the opinion the Court said (p. 599):

" The proceeding by injunction is of a *civil character* and may be enforced by proceeding in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offence committed in the course of such violation;"

The contention of Debs was that the proceeding against him in the Circuit Court was a criminal proceeding, that it was outside of the province of equity to enjoin the commission of crimes, that a Chancellor has no criminal jurisdiction. But the Attorney-General argued that the suit was a civil suit which the Circuit Court could entertain under its chancery powers. This latter view was sustained, and the

language quoted above was used with reference to that theory, and to distinguish that theory from the petitioner's position.

We suppose its import is not to be extended beyond the principle which it was intended to elucidate, and the point to which that principle was applied. The opinion does not refer to *Ex parte Kearney* or *New Orleans vs. Steamship Co.*, and it is not to be assumed that this Court intended to overrule them or qualify their reasoning or conclusions.

In the "Statement of the Case" at page 573 it is said that a writ of error taken by Debs to the Supreme Court had been denied on the ground that the order of the Circuit Court was not a final judgment or decree." This statement of the ground was probably the reporter's error, and should have been that the order was not *such* a final judgment or decree as this Court could review.

In 159 U. S., 251, it is noted that the writ of error was dismissed, but the ground is not stated.

In *Tinsley vs. Anderson*, 171 U. S., 101–105, the *Debs* case is mentioned in such connection as to indicate that this Court distinguishes the ruling in the *Debs* case from that in *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and regards the latter as still applicable to independent proceedings for contempts in the Circuit Court, including fining judgments for disobedience or preliminary injunction.

The Circuit Court of Appeals for the Second Circuit does not, however, so consider it.

Conflicting Decisions in the Circuit Courts of Appeals.

In *Sessions vs. Gould*, 63 Fed. Rep., 1001 (same case, 11 C. C. A., 550) (An. 1894), an order or judgment imposing a fine for contempt in a patent case was brought up on *appeal*. The Court held that it had jurisdiction under Section 6 of the act to establish Circuit Courts of Appeal to review a criminal judg-

ment, but could do so only upon *writ of error*. Mr. Justice BROWN sat in the case.

In *Gould vs. Sessions*, 67 Fed. Rep., 163; same case 14 C. C. A., 366 (An. 1895) the same Court reviewed the contempt proceedings on writ of error. The Court held that the fining order "was in effect a judgment in a criminal case" on the authority of *New Orleans vs. Steamship Co.* and the Court noticed that the fine was imposed as a fine to be paid to the government and not to enure to the benefit of the plaintiff, and distinguished *Worden vs. Searles* on that point and reversed the order. Mr. Justice BROWN also sat in this case.

In *Nassau Electric Ry. Co. vs. Sprague R. & M. Co.*, 95 Fed. Rep., 415 (same case, 37 C. C. A., 146) (An. 1899), a writ of error to review an order imposing a fine for a violation of the preliminary injunction in a patent case was dismissed by the same Court under the authority of the *Debs* case, the Court being "con-" strained to hold that the order cannot be reviewed "except upon an appeal from the final decree in the "cause." As the latter mode of review was not then before the Court, we suppose that its intimation was not binding, and, in the present case, the Court is careful not to commit itself (fol. 40).

In *Cary Mfg. Co. vs. Acme Flexible Clasp Co.*, 108 Fed. Rep., 873 (same case, 48 C. C. A., 118) (An., 1901), the same Court entertained a writ of error to review a judgment of the Circuit Court imposing a fine for violation of an injunction. The opinion does not indicate whether the injunction was interlocutory or one granted by final decree. The opinion of the same Court in the case at bar says the latter was its character, and thus explains the apparent conflict between the decision and that in *Nassau vs. Sprague* (see Opinion, fol. 37).

Cary, &c. vs. Acme, &c., was brought into the Supreme Court by writ of error to the Circuit Court of Appeals, but the Supreme Court dismissed the writ on the grounds that the judgments and decrees of the

Circuit Court of Appeals in all cases arising under the patent laws and the criminal laws are made final by Section 6 of the Judiciary Act of March 3, 1891, and on the further ground that although the Supreme Court might have jurisdiction under Section 5 of that act, yet, the plaintiff-in-error having carried his case directly to the Circuit Court of Appeals, he must abide by the judgment of that Court (See 187 U. S., 427).

All the foregoing decisions were by the Circuit Court of Appeals for the Second Circuit.

Finally, the same Court of Appeals in the case at bar says "the hardship of compelling a party to wait "until he can appeal from a final decree to obtain a "review especially in cases in which the defendant "has been committed and is suffering imprisonment, "is manifest; and we should be glad to be able to see "our way clear to depart from our former decision," referring to *Nassau vs. Sprague*, in which it was constrained by the authority of *In re Debs* to deny its jurisdiction of a writ of error. But, of course, it is not committed to take jurisdiction, and cannot, when the fining judgment is brought up with the final decree, unless the case is squarely within *Worden vs. Searles*, and to be so the fining order or judgment must award the fines to the plaintiff *as damages*, which the fining order in the case at bar does not do.

In *Re Paquet*, 114 Fed. Rep., 441 (same case, 52 C. C. A., 239) (An., 1902), the Circuit Court of Appeals for the Fifth Circuit, said, as a *possibility* that a writ of error would lie, in view of the explanation of the *Debs* case contained in *Tinsley vs. Anderson*.

In *Re Nevitt*, 117 Fed. Rep., 448 (same case, 54 C. C. A., 622) (An., 1902), the Circuit Court of Appeals for the Eighth Circuit explains and comments on the difference between criminal and civil contempts, and holds that fining orders made to vindicate the authority and dignity of a Court contemned by disobedience of its order is strictly of a *criminal* and *punitive* character on the authority of *New Orleans vs. Steamship Co.*

That Court, therefore, is not, like the same Court for

the Second Circuit, constrained to regard such contempts to be within the ruling of the *Debs* case, and as of a "civil character."

Since the petition at bar was filed, the Circuit Court of Appeals for the Sixth Circuit, in *Bullock Electric Mfg. Co. vs. Westinghouse Electric Mfg. Co.*, has taken jurisdiction of a writ of error to review an order or judgment of a Circuit Court fining defendant for violation of a *preliminary* injunction in a patent case, and *reversed* the order or judgment. The opinion ~~states~~ shows that the defendant in error brought to the attention of the Court the opinion of the Court of Appeals for the Second Circuit rendered in the case at bar, but the Court of Appeals for the Sixth Circuit refused to follow it, being of opinion that there was nothing in the *Debs* case, properly understood, to change the rule as it had theretofore existed.

The question arose on a motion to dismiss the writ of error.

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported.

Therefore we quote from a manuscript copy of the opinion (by Judge LURTON) all that is said on the subject, as follows, and make the same a part of our argument:

"I. The willful violation of an injunction by a party "to the cause is a contempt of court constituting a "specific criminal offense. *Ex parte Kearney*, 7 "Wheat., 37, 42; *Crosby case*, 3 Wilson, 188; *New "Orleans v. Steamship Co.*, 20 Wall., 387, 392; *Hays "v. Fischer*, 102 U. S., 121; 4 *Ency. Pl. & Pr.*, 766 "*et seq.*

"It is immaterial to consider the distinction some- "times noticed between criminal and civil contempts "inasmuch as both kinds involve the vindication of "the authority of the court whether the remedy in- "cidentally inure to the benefit of a party or not. "*Cyclo. Law & Proc.*, 6 *et seq.*

"The proceeding to punish for a contempt is in its "nature a criminal proceeding whether the result be "partially remediable or not, and the same rules "prevail which govern in the trial of indictments, the

" defendant being entitled to the benefit of any reason-
" able doubt. *Accumulator Co. v. Consolidated Electric*
" *Co.*, 53 F. R., 793; *In re Acker*, 66 F. R., 291; *Har-*
" *well v. State*, 10 Lea (Tenn.), 544; 4 *Ency. Pl. & Pr.*,
" 768 *et seq.*; *U. S. v. Jose*, 63 F. R., 951.

" Although the contempt consists in the violation of
" an injunction granted by a court of equity, the pro-
" ceeding for its punishment 'is a new and distinct
" proceeding and is quite independent of the equities
" of the case on which the decree is founded'; and 'an
" appeal is not an appropriate remedy for obtaining a
" review.' *City of Frankfort v. Deposit Bank of*
" *Frankfort*, decided at February session of this court
" and not yet reported; *New Orleans v. Steamship Co.*,
" 20 Wall., 387, 392; *In re Chetwood*, 165 U. S., 443.

" Is it reviewable by a writ of error?

" A contempt proceeding is classified as a mis-
" demeanor and not as a felony. *In re Acker*, 66
" F. R., 821.

" Misdemeanors are reviewable by this court upon
" writ of error by virtue of the broad appellate powers
" conferred by the Act of March 3, 1891, establishing
" Circuit Court of Appeal, and defining and regulating
" the appellate powers of United States Courts.

" If, therefore, the imposition of the fine complained
" of 'was a judgment in a criminal case' as it is
" defined to be in *New Orleans v. Steamship Co.* 20
" Wall., 387, 392, it was a judgment in a misdemeanor
" case, for contempts are universally classified as mis-
" demeanors and not felonies. *In re Acker*, 66 F.
" R. 291.

" If a judgment in a misdemeanor case, it is re-
" viewable upon writ of error by this court.

" This conclusion was reached by the Circuit Court
" of Appeals for the Second Circuit in *Gould v.*
" *Sessions*, 67 F. R., 163. But in *Nassau Electric R.*
" *Co. v. Sprague Electric Co.*, 95 F. R., 415, and
" *Christensen Engineering Co. v. Westinghouse Air*
" *Brake Company*, decided Feb. 15, 1904, and not yet
" reported, writs of error were dismissed upon the
" authority of *In re Debs*, 158 U. S., 564, 573.

" In the statement of the Debs case at page 573, it
" is stated that the defendants in that case 'applied
" 'to this court for a writ of error and also one of
" 'habeas corpus. The former was denied on the
" 'ground that the order of the Circuit Court was not
' 'a final judgment or decree.'

" The only report of the decision on the writ of

" error is found in 159 U. S., 251, number 10, where " the statement is, 'Petition denied.'

" The Supreme Court had no jurisdiction in respect " of writs of error in misdemeanor cases and the writ " of error upon this ground was necessarily denied.

" The reporters' statement that it was denied be- " cause the order 'was not a final judgment or decree' " is doubtless an error. Certainly we do not feel " justified in departing from the well settled doctrine " so often enunciated in former cases, in respect to " the distinctness of a judgment imposing a fine for " contempt from the case in which the disobeyed " order was made, upon so slender an authority.

" If the judgment, as in this case, was in fact " unconditional and absolute, so that nothing remained " but to execute it, it was in every sense a final judg- " ment.

" The claim that a defendant in such circumstances " must await the final result of the cause in which the " injunction was granted before he can have the judg- " ment inflicting fine or imprisonment reviewed upon " the theory, that the judgment is not final is abso- " lutely unsupportable.

" If it be an independent and distinct proceeding " from the residue of the case it will be no more final " after that case has reached a final decree than when " the fine was imposed. To say that he may pay his " fine or endure his imprisonment and review the " legality of the matter at some indefinite time in the " future is to deny, in effect, the right of review at all.

" The motion to dismiss the writ is denied."

There appears, therefore, to have been two contradictory decisions of precisely the same question by Circuit Courts of Appeal in different circuits.

In the *Bullock* case the whole fine was made payable to the Clerk of the Court, while in the case at bar only one half of the fine is so payable, the other half to the complainant, but not as damages.

The state of the authorities then on this important question is substantially as follows:

Section 725 R. S. makes disobedience of a Court's order a crime by punishing it with fine or imprisonment, hence a misdemeanor.

Ex parte Kearney held contempt of Court to be a crime, and for that reason not within the appellate jurisdiction of the Supreme Court.

New Orleans vs. Steamship Co. held similarly in a purely civil case, and, in reviewing the final decree, separated the *fining* part of it from the rest of the decree, and held that, because it is criminal in character, the Court could not review it.

Re Swan (150 U. S., *supra*), held similarly.

Worden vs. Searles reversed orders punishing for contempt along with the final decree, because, although the fining orders were *nominally* criminal, the fines for contempt were *really* awards of damages to the plaintiff, as in fact on their face they were.

It would seem, therefore, that in a case like that shown in the petition where half the fine is payable to the clerk, presumably for use of the government, and the other half to the complainant, but *not* as damages, the order or judgment imposing the fine is not reviewable with the final decree. If it is not, it is reviewable if at all, only by writ of error to the Circuit Court of Appeals under Section 6 of the Act of March 3, 1891.

The Circuit Court of Appeals for the Second Circuit took that view of it in *Gould vs. Sessions*, 67 Fed. Rep., 163, on the authority of *New Orleans vs. Steamship Co.*, but in *Nassau, &c., vs. Sprague, &c.*, 95 Fed. Rep., 415, declined jurisdiction under the authority of *In re Debs.*

In re Debs is construed by the Circuit Court of Appeals, Second Circuit, as overruling *ex-parte Kearney* and *New Orleans vs. Steamship Co.*, although neither of those cases are referred to in the opinion.

In *Tinsley vs. Anderson* the Supreme Court explains and apparently limits *In re Debs*, but not so explicitly as to induce the Circuit Court of Appeals in the present case to depart from its ruling in *Nassau, &c., vs. Sprague*, and return to that of *Gould vs. Sessions.*

In *Re Paquet* the Fifth Circuit intimates that *possibly* a writ of error will lie, notwithstanding the *Debs* case, in view of *Tinsley vs. Anderson.*

In *Re Nevitt*, the Eighth Circuit holds fining orders or judgments for disobedience of orders, inflicted to vindicate the dignity of the Court, to be criminal and punitive in character, notwithstanding the ruling in the *Debs* case.

Under the *semble* in *Re Paquet*, the Court in the Fifth Circuit would *possibly* have taken jurisdiction of a writ of error like petitioner's.

Under the rule defining criminal contempts in *Re Nevitt*, the Court in the Eighth Circuit would we think, certainly have taken jurisdiction of such a writ of error.

In *Bullock vs Westinghouse* (not reported) the Court for the Sixth Circuit takes jurisdiction of a writ of error and *reverses* the judgment.

But the Second Circuit declines jurisdiction.

In view of the explanation of *Re Debs* contained in *Tinsley vs. Anderson*, we believe the Court of Appeals for the Second Circuit should have taken jurisdiction and considered petitioner's writ of error on the merits.

It may properly be suggested that the question presented by the petition is one of the jurisdiction of the Circuit Court of Appeals, and one where that Court for the Second Circuit has entertained on successive occasions opposing views, and, finally, a view opposite to that of the Court for the Eighth Circuit, and the Sixth Circuit, while the Court for the Fifth Circuit regards its jurisdiction as possible. Under such circumstances, the question is of general interest as well as immediate to the petitioner.

Section 725 places no limit, except discretion, upon the *amount* of the fine or the *duration* of the imprisonment. Plainly, the guilt of the accused and the soundness of the discretion exercised in the punishment *should be* reviewable, and we think Section 6 of Act of March 3, 1891, makes them so.

The petition is distinguishable from that of *In re* Key, 189 U. S., 84, where this Court held that a writ of mandamus could not be used to perform the office of an appeal or writ of error, and does not lie to review

a final judgment or decree sustaining a plea to the jurisdiction. No such circumstances are here presented.

This Court, therefore, is respectfully urged to grant the writ of mandamus prayed for or such other writ under Section 716, Revised Statutes, as may be appropriate.

WM. A. JENNER,
Of Counsel for Petitioner.

Supreme Court of the United States

IN THE MATTER

OF

The Petition of THE CHRISTENSEN ENGINEERING COMPANY for a Writ of Mandamus to The United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT BY COUNSEL FOR DEFENDANT IN ERROR IN THE COURT BELOW.

Statement.

This is an application for a writ of mandamus to the United States Circuit Court of Appeals for the Second Circuit, directing it to take jurisdiction and consider the merits of the petitioner's writ of error from the United States Circuit Court for the Southern District of New York to the Circuit Court of Appeals, to review an interlocutory order of the Circuit Court entered in an *equity* suit brought for the infringement of United States Letters Patent No. 481,134 to George A. Boyden for Valves for Air-Brakes, and holding that the petitioner had disobeyed an *interlocutory* order of the Circuit Court granting a *preliminary* injunction restraining the petitioner from infringing claim 2 of the said letters patent, and had violated the *preliminary* injunction granted thereunder, and for such misconduct and contempt of Court, directing that the petitioner be fined the sum of $1,000, $500 of which was to be paid to the Clerk of the Court and $500 to the complainant in the suit, which writ of error the Court

of Appeals dismissed for lack of jurisdiction to review the same.

The order in question and all the proceedings for contempt were entitled in the suit.

After the contempt order was entered, an *interlocutory* decree sustaining the said claim 2, and also claims 4 and 11 of the patent, and granting a perpetual injunction and an accounting, with a reference to a Master, was made and entered.

On an appeal from the said *interlocutory* decree, the Circuit Court of Appeals sustained claims 4 and 11, but was inclined to hold that the structure of claim 2 was identical with the structure of claim 11, but on rehearing the Circuit Court of Appeals considered this view of claim 2 erroneous, and was of the opinion that such claim could be held valid and distinguished from claims 4 and 11, and gave the petitioner the right to submit briefs on this question. This the petitioner has done, and the Court of Appeals now has the question under advisement.*

The proceedings on the accounting have not been had, and no *final* decree has as yet been entered in the suit.

The Question Before This Court.

The jurisdiction of the respondent to review the order of the Circuit Court could only exist on the theory that it was conveyed by Section 6 of the Act of March 3, 1891. That act conferred on the Courts of Appeals the right

" to review by appeal or writ of error final decisions in the District Courts and existing Circuit Courts in all cases other than those provided for in the preceding section of this act *(i. e.*, providing for direct appeals to this Court), unless otherwise provided by law."

The petitioner is understood to contend that the order fining for contempt of a preliminary injunction is a " final decision " in a criminal case.

* Since the above was written the Court of Appeals has adjudicated the said claim 2 not infringed

I.

The order in question was not such a final judgment in a criminal case as could be reviewed by the respondent.

The power of every superior Court of record, to punish as for contempt, any disobedience of its orders, judgments or decrees, is, in the nature of things, inherent and essential and necessary to the exercise and enforcement of all its other powers (*United States vs. Hudson*, 7 Cranch, 32; *Anderson vs. Dunn*, 6 Wheat., 204; *in re Debs*, 158 U. S., 594). This power exists irrespective of statute, though the manner in which it may be exercised may be limited and regulated by statute (*Ex Parte Robinson*, 19 Wall., 506). And this power has been recognized and its exercise regulated by Congress (R. S., Sec. 725).

At common law, a Superior Court of competent jurisdiction whose authority was violated, or whose orders, judgments or decrees were disobeyed, was the exclusive judge of the contempt, and the exercise of its power to punish, therefore, if it had jurisdiction of the person and the offense, could not be ~~raised or~~ reviewed on appeal or writ of error. The reason for this rule is obvious.

"Every superior court of record, being at common law, the sole judge of contempts against its authority and dignity, it naturally results that the judgment of every such court, in cases of contempt is, at common law, *final* and *conclusive, and not reviewable by any other tribunal*, (which in other cases would lawfully exercise appellate jurisdiction), either on writ of error or appeal, unless *specially* authorized by statute."

Rapalje on Contempts, Sec. 141. (Italics ours.)

At common law every Superior Court is the *sole judge* in the last resort of contempts arising therein.

In re Yates, 4 Johns., 314.

In *Ex Parte Kearney*, 7 Wheaton, 36, where this Court declined to grant a writ of *habeas corpus* to relieve a party from punishment for contempt of Court, for refusing to answer certain questions in a criminal prosecution in the circuit court, Mr. Justice STORY quoted, with approval, the following from Justice BLACKSTONE in *Crosby's* case:

"All courts, by which I mean to include the two Houses of Parliament and the courts of Westminster Hall, can have no control of any matters of contempt. The sole adjudication of contempt and the punishment thereof belongs exclusively and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writs of *habeas corpus*, examine and determine the contempt of other courts.'

This expression was again quoted with approval by this Court in *New Orleans vs. Steamship Co.*, 20 Wall., 387.

In the matter of *Clinton B. Fisk*, 113 U. S., 713, a suit was brought in the Supreme Court for the State of New York against the petitioner to recover a sum of money alleged to have been obtained by false and fraudulent representations. In the course of the suit, an order was obtained for the examination of Fisk before trial. After other proceedings were had, Fisk appeared and submitted to a partial examination, answering some questions but declining to answer others. Pending one of the adjournments, the case was removed to the Circuit Court of the United States for the Southern District of New York. That Court then made an order continuing the examination before a Master. Fisk, on refusing to be sworn and declining to testify, was brought before the Court on proceedings to punish him for contempt in refusing to obey the Court's order. Subsequently he was held by the Circuit Court to be in contempt and fined $500, and committed to the custody of the marshal until it was paid. He thereupon made an application to this Court for a writ of *habeas corpus*.

It was contended that this Court had no power to review the order referred to. This Court said:

"There can be no doubt of the proposition, that the *exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the Court has authority to make them,* except through the Court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the Court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

"When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an *order which that court had no authority to make,* the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this Court, that when the proceeding for contempt in such a case results in *imprisonment,* this Court will, by its writ of *habeas corpus,* discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this Court will, in the language of the statute, make "*inquiry into the cause of the restraint of liberty*" (Sec. 752, R. S., italics ours).

In this case the Court held that the Circuit Court had no authority to make the orders for the examination of the petitioner, and was also without authority to enforce the orders by process for contempt, and therefore its order fining the petitioner for contempt and committing him to the custody of the marshal was without jurisdiction and void.

See, also, *ex parte* Savin, 131 U. S., 275; *In re Cuddy,* 131 U. S., 284.

In *ex parte* Tyler, 149 U. S., 164, this Court held that it had no jurisdiction to review on petition for *habeas corpus* an order of the Circuit Court imposing on a party a fine for contempt for violating an interlocutory injunction, and committing him until it was

paid, unless the order was utterly void for want of power to grant it.

In the unanimous opinion of this Court in the *Debs Case*, 158 U. S., 594, it was said:

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. *To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency*". (Italics ours.)

This is true, whether the question of the violation or disobedience of a court's order is submitted to another Court or tribunal in the first instance, or taken there for review on appeal, or by writ of error.

It has been urged that such a rule placed too much power in the hands of a single Judge, and caused too great inconvenience. But in *Ex Parte Kearney, supra*, Mr. Justice STORY said:

"Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere, and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not devised by courts of justice."

In re Terry, 128 U. S., 289, the Court, in denying a petition for a writ of *habeas corpus* in behalf of a party committed for contempt by a Circuit Court, said:

"It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts.

* * * * * *

"Whether the facts justified such punishment was for that court to determine under its solemn responsi-

bility to do justice, and to maintain its own dignity and authority. *In re* Chiles, 22 Wall., 157, 168. Its conclusion upon such facts, we repeat, is not, under the statutes regulating the jurisdiction of this court, open to inquiry or review in this collateral proceeding."

In neither *Ex parte Kearney, New Orleans vs. Steamship* or *In re Debs, supra*, did this Court hold that it had jurisdiction to review by writ of error or appeal proceedings for contempt, but the three cases are in harmony with the rule of law that the Court whose authority had been violated was the exclusive judge of the contempt. It was intimated in all these cases that the proceedings were not subject to re-examination by any other tribunal.

On the other hand, in *ex parte* Fisk, *supra*, it was distinctly stated that the exercise of the Circuit Court's power to punish for contempt of its orders, was not subject to review by a writ of error or appeal to this Court, nor was there in the federal system of jurisprudence any relief against such orders, where the Court had power to make them ; but that where the Court undertook to punish as for contempt a party refusing to obey an order which the Court had no authority to make, and the proceedings for contempt resulted in *imprisonment* of the party, the Court would, by its writ of *habeas corpus*, discharge the party.

It is submitted that the rule referred to in *Ex parte Fisk* still exists in the Federal Courts, in the absence of statute giving expressly the right to review, by writ of error or appeal, orders, judgments or decrees, *fining for contempt of court.*

There is no Act of Congress which in express terms gives the Appellate Courts of the United States jurisdiction to review such orders, judgments or decrees. It only grants jurisdiction " to review by appeal or writ of error final decisions " in all cases in which this Court has direct appellate jurisdiction, " *unless otherwise provided by law.*" It is believed that there is but

one instance in which this Court has reviewed, otherwise than by *habeas corpus* where the order violated was absolutely void, an order fining for contempt, and that was considered on appeal from a *final* decree, and was regarded as only *nominally* for contempt *(Worden vs. Searls, infra)*.

The object and policy of the acts of Congress in limiting appeals and writs of error to "final decisions," were to have all matters which were the subject of dispute decided by a single appeal so as to avoid delays and to save expense of successive appeals on different questions which might be all determined by a single appeal *(McLish* vs. *Roff*, 141 U. S., 661*)*.

The appellate powers of the Circuit Courts of Appeals of the United States are dependent entirely upon statute. They have no jurisdiction to review any proceedings of the lower courts, other than those specifically mentioned in the statute, and those that may reasonably be inferred from the language used in the statute, considered in the light of the objects and policy of the act.

It is submitted that if Congress intended to alter the ordinary provision of law by conferring power to review orders of attachment, or fine for contempt it would have done so by specific language.

In creating the Courts of Appeals, Congress continued the policy above referred to, of limiting the right of appeal, or review by writ of error; for the appellate jurisdiction of those courts is confined, by the act creating them, to the review, by writ of error or appeal, of *final* decisions, and interlocutory orders or decrees granting or continuing an injunction in an equity suit, and appointing a Receiver, in cases where there is an appeal from a *final* decree under the act. This act does not specifically or in terms give the Courts of Appeals jurisdiction to review, by appeal or writ of error, orders for contempt of court. On the contrary it merely gave Appellate jurisdiction from all "final decisions" not directly appealable to this Court, "unless otherwise provided by law."

The respondent, therefore, had no jurisdiction to review the order in question.

Some of the language used by this Court in deciding the cases of *Ex Parte Kearney* and *New Orleans vs. Steamship Co., supra*, has been construed into a finding that contempt of Court, in violating the Court's order in a civil suit, was a criminal offense, the proceedings to punish therefor a criminal prosecution, independent of the civil suit, and the order of punishment a final judgment in a criminal case, notwithstanding that all the proceedings are made and entitled in the civil suit.

We do not, however, understand that it has been so decided in connection with such orders as that involved in the present case.

Sometimes the Courts have divided contempts into two classes—one criminal and coercive, and the other civil and remedial—the former being conducted to vindicate the dignity of the Court and to punish for violation of its orders, and the latter to enforce the remedies of parties to the suit, and compel obedience to the orders and judgments made to protect the rights of such parties. This distinction, however, is not a true one, for in almost every case of contempt of Court the Court's directions or orders are disobeyed and violated, and in every case the punishment, whatever it may be, and even though it is for the benefit of a party to the action, is to vindicate the Court's authority.

In *State of Texas vs. Childs*, 22 Wall., 322, this Court, in referring to Sec. 725 of the Revised Statutes concerning punishments for contempt of Court, said:

"Such has always been the power of the courts both of common law and equity. The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for this disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform (Stimpson v. Putnam, 41 Vt., 238).

" In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

The disobedience or the violation of the orders, judgments or decrees of the Courts of the United States in a civil suit, and at least of the order in question, is not a crime or an infamous crime, or a felony, under the laws of the United States. The proceeding to punish such contempts is not conducted by or on behalf of the United States, nor is it conducted for the purpose of punishing a violation of any of the criminal laws of the land. The proceeding is conducted by a private party, in a private suit, for the purpose of protecting and enforcing private rights and securing remedies given to private parties in civil actions, and which the civil courts have held they are entitled to, though it incidentally involves a vindication of the court's authority.

Mr. Justice BREWER, *In re Debs*, 158 U. S., 596, in giving expression to the unanimous opinion of this Court, said :

" In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to. * * * that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt ; *that such proceedings are not in execution of the criminal laws of the land ;* that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation ; * * * and finally, that the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court."

It is, therefore, submitted that the violation of the order in question was not a crime or criminal offense, that the proceeding was not a criminal prosecution, and that the means or manner the Court adopted to

enforce its directions and vindicate its authority, was not a "final" decision or judgment (independent of the suit) in a criminal case.

Therefore, the respondent had no jurisdiction to review by writ of error, on the theory that the order in question, made in an *equity* suit, was a final decision in a criminal case.

This Court has held that an order punishing as for contempt, the violation of a *preliminary injunction* cannot, at least apart from the final decree, be reviewed by writ of error or appeal.

In *Hayes vs. Fischer*, 102 U. S., 121, it was said:

"Fischer, the defendant in error, brought a suit in *equity* in the Circuit Court of the United States for the Southern District of New York, to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an *interlocutory injunction* was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he *pay the clerk* $1,389.99 as a fine, *and that he stand committed until the order was obeyed.* To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the Circuit Court cannot be re-examined here.

"*If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by wait of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.*

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex Parte* Kearney, 7 Wheat., 38, and the rule then established was followed as late as New Orleans v. Steamship Co., 20 Wall., 387 (87 U. S., XXII., 354).

"It follows that we have no jurisdiction, and the motion to dismiss is, consequently, granted." (Italics ours.)

In this case the Court did not hold that the contempt was a criminal offense, nor that the order directing the

payment of a fine to the Clerk, and committing the party until paid, was a proceeding criminal in its nature and independent of the suit, but it seems to strongly indicate that the order of contempt for violating a *preliminary injunction* was a mere *interlocutory* order in a civil suit. The most that was intimated was that it possibly might be corrected on appeal from the *final* decree. That question is not now before the Court.

And *in re Chetwood*, 165 U. S., 443, and *Tinsley vs. Anderson*, 171 U. S., 101, this Court did not hold that contempts were crimes, nor that proceedings to punish, therefore, were criminal prosecutions and the order a judgment in a criminal case, but it did hold that such proceedings were not reviewable in this Court by appeal or writ of error, saying in the latter case "they may be reached by *certiorari in the absence of any other adequate remedy.*"

In the matter of *McKenzie*, 180 U. S., 546, this Court held that the writ of *habeas corpus* could not be used as a writ of error, and when applied for to relieve a party from restraint in punishment for contempt for violating an order of the Court, it would not be issued unless the order violated was absolutely void for want of jurisdiction.

Upon the petitions of *Watts* and *Sachs*, 190 U. S., 1, for *habeas corpus* and *certiorari*, this Court examined proceedings sentencing the petitioners to *imprisonment* for contempt of Court.

But in neither of these late cases has the Court held, that an order entered in a civil suit, fining a party for contempt of a previous order of the Court of which it had jurisdiction, was a judgment in a criminal case independent of the civil suit.

Worden vs. Searls, 121 U. S., 14, is the only case which has been found in which this Court has reviewed, either by writ of error or appeal, an order fining for contempt. In that case the lower Court had sustained the validity of the patent and had granted an injunction against its infringement. Cou-

tempt proceedings being brought for violation of the injunction, certain fines were imposed; one of $250, together with the costs of the contempt proceedings was to be paid *to the complainant* and by a later order a fine of $1,182 was to be paid to the Clerk of the Court and to be then paid over *to the complainant* to cover damages and costs of the contempt proceedings. The case being taken to this Court on an *appeal* from the *final* decree, the following language was used (7 Sup. Ct., 820):

"The appellants asked for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this Court cannot review the action of the circuit court in punishing a contempt committed by a violation of such injunction (1) because the proceedings were criminal in their character; (2) because the action of the circuit court is, by section 725 of the Revised Statutes, expressly made discretionary.

"All the proceedings which resulted in the imposition of the fines were taken and entitled in the suit.

* * * * * *

"These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that of *Ex Parte* Kearney, 7 Wheat., 39.

* * * * * *

"So the fact in the present case that, though the proceedings were *nominally* those in contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to his expenses, distinguishes the case from that of New Orleans v. Steamship Co., 20 Wall., 387."

In the *Debs* case, this Court dismissed a writ of error from an order adjudging Debs in contempt of an *ex parte* and *preliminary* injunction on the ground that the order "was not a final judgment or decree" (158 U. S., 564, 573; 159 U. S., 251)

It would *seem* to follow from these decisions that an interlocutory order imposing a fine and directing that at least a portion of the same shall be paid to the complainant is regarded as part of what is done in the case, and while it might perhaps be reviewable on appeal from the final decree, if contempt proceedings are reviewable at all in cases where the Court has jurisdiction, it certainly is not a "final decision" or judgment in a criminal case, and it certainly is *not* reviewable on *writ of error*.

Such is the case here, and, that being so, it follows that the respondent was correct in dismissing the writ of error.

II.

The order in question was not in any sense a final judgment which could be reviewed by the respondent.

It is respectfully submitted that such an order as the present one, based on a mere *preliminary* injunction *pendente lite*, is not in any proper sense a *final* decision or decree or judgment of the Circuit Court, and hence was not reviewable as such by the respondent.

Such was the ruling of the respondent in *Sprague Co. vs. Nassau R. R.*, 95 F. R., 415, and of this Court in *ex parte Debs*.

It is conceded by the petitioner "that if the Circuit Court's order or judgment fining for contempt was not final, but intermediate and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed" (Petitioner's Brief, page 2).

The order in question, which was entitled in the suit, held that the petitioner, by the sale of certain valves, after the issuing of the *preliminary* injunction, had infringed claim 2 of the patent in suit and had

disobeyed and violated the order for the *preliminary* injunction and the injunction issued thereunder, and for such misconduct the order directed the payment of the fine, partly to the Clerk and partly to the complainant.

Of course, on the proceedings for contempt, the same question of infringement which had been raised on the application for the *preliminary* injunction was not again considered, *de novo*, but the Court, in finding the petitioner for contempt, necessarily determined that the valves sold in contempt of the Court's order, and in violation of the complainant's rights, were substantially the same as, or substantially similar to, those it had previously determined were infringements.

The order adjudging the petitioner in contempt, therefore, was not a new proceeding, independent of the merits of the case, on which the final decree was to be based.

The order related to the merits of the case, in that it adjudged that the valves sold were similar to those previously held to be infringed, and therefore were infringements of claim 2.

It did not, however, finally determine the litigation between the parties on the merits, nor did it finally determine the question of infringement of claim 2. Its determination that the valves sold in contempt of the order for preliminary injunction were similar to the valves held to be infringements by the order for preliminary injunction, is not final, for the whole proceeding might have been reconsidered and redetermined otherwise by the same Court at final hearing as any order may be, at which stage of the suit all interlocutory and previous orders may be reconsidered.

Fourniquet vs. Perkins, 16 How., 82.
Spill vs. Celluloid Co., 22 Blatch., 441, 450.

An order fining a party for contempt of a preliminary injunction is no more "final", in its nature, than many other orders that might be made in the progress of a case, and which dispose of a matter to which they specifically

relate, at least until the final hearing or final decree. It can hardly be said that all of these orders are reviewable by writ of error or appeal, merely because, as to the particular matter mentioned in the order, nothing further remains to be done.

An order directing a party or a witness to produce books, disposes of *that* matter, but it is hardly a "final" order from which an appeal can be taken.

An order setting aside service of process or deciding that process has been properly served, disposes of *that* matter, but the order is hardly an appealable one, except in connection with the final decree.

An order directing property to be turned over to a receiver was held by this Court not to be a final order.

Brown vs. Swann, 9 Peters, 1.
Forgay vs. Conrad, 6 How., 201.

In *Carr vs. Hoxie*, 13 Pet., 462, this Court held that a decree ordering a sale in execution of a previous decree was but a decree in execution of the original decree, and not a final decree in contemplation of the act of Congress from which an appeal lies.

An order directing money to be paid into Court was held by this Court not a final order.

Pullman vs. Christian, 6 How., 209.
Lodge vs. Trevor, 135 U. S., 232.

A decree dissolving an injunction is not a final decree.

McCollum vs. Eager, 2 How., 61.

In *McMicken vs. Perin*, 20 Howard, 133, a decree of the Circuit Court was affirmed by this Court on appeal. The cause was remanded to the Circuit Court to carry the decree into effect. After this an attachment was issued by the Court to compel the defendant to execute a conveyance directed by the decree. From the order for attachment the defendant appealed. This Court, in dismissing the appeal said :

"By the appeal from the former decree, the time within which the money was required to be paid was necessarily suspended. But that decree having been affirmed by the Supreme Court, and remanded to the

Circuit Court to be carried into effect, nothing further was required to be done. The tender and deposit of the money in court was all that Perin was required to do, to authorize the court to attach McMicken for a contempt, in refusing to make the conveyance. This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. It is, in effect, the same as ordering an execution on a judgment at law, which had been affirmed on error, and remanded for execution to the Circuit Court. It has been held that an order of sale in execution of an original decree is not a final decree, on which an appeal will lie."

This Court has frequently held that an order, judgment or decree, for the purpose of review by appeal, or writ of error, must terminate the suit or litigation between the parties on the merits of the case, so that the whole purpose of the suit has been accomplished, and there is nothing left for the lower Court to do *in the case*, except to execute the judgment or decree.

Bostwick vs. Brinckerhoff, 106 U. S., 3.
School District vs. Hall, 106 U. S., 49.
Railway Co. vs. Express Co., 108 U. S., 24.
Moore vs. Fletcher, 114 U. S., 127.

In considering what is a reviewable judgment or decree, the object of Congress giving the right to review should be considered, and that was to have all matters in dispute determined by a single review. Considered in the light of this policy, the order in question cannot be regarded as final.

It is submitted that the respondent had no jurisdiction to review the order in question, and that the writ of error was properly dismissed. Therefore, the application for mandamus should be dismissed with costs.

Respectfully submitted,
FREDERIC H. BETTS,
Of Counsel for Respondent and for Defendant in Error in the Court below.

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JAMES H. McK

No. 15 Original.

Supreme Court of the United States.

IN THE MATTER

OF

THE PETITION OF THE CHRISTENSEN ENGINEERING COMPANY FOR A WRIT OF MANDAMUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondent.

RESPONDENT'S ANSWER.

FREDERIC H. BETTS,
Of Counsel for Respondent and for Defendant in Error in the Court below.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of the CHRISTENSEN ENGINEERING COMPANY Praying for a Writ of Mandamus to the United States Circuit Court of Appeals for the Second Circuit, Respondent.

The Judges of the United States Circuit Court of Appeals for the Second Circuit answering the petition of the Christensen Engineering Company that they show cause why a writ of mandamus should not be granted commanding them to reinstate and take jurisdiction of the writ of error, in the case of Westinghouse Air Brake Company vs. Christensen Engineering Company, which was dismissed by them, and to entertain and consider the merits of said writ of error, and to decide the same upon the merits, respectfully submit their action in the premises to the judgment of this Honorable Court, and certify that their reasons for dismissing the said writ of error, which was sued out on March 23, 1903, and argued before them on December 14, 1903, are fully set forth in their opinion, a copy of which is annexed to the said petition.

And the said Judges of the United States Circuit Court of Appeals for the Second Circuit, hereby ap-

point Frederic H. Betts counsel for the defendant in error before the said Circuit Court of Appeals for the Second Circuit, to represent them and present to the Honorable the Supreme Court of the United States such considerations in connection with said petition as he may be advised.

Dated April 20, 1904

(sgnd) Wm J Wallace
(sgnd) Wm K Townsend
(sgnd) Alfred C Coxe
Judges United States Circuit Court of
Appeal for the Second Circuit

Supreme Court of the United States.

No. 15, Original.—October Term, 1903.

In the Matter of the Petition of
The Christensen Engineering Company
for a Writ of Mandamus.

[May 31, 1904.]

This is a petition for a writ of mandamus commanding the Circuit Court of Appeals for the Second Circuit to reinstate and take jurisdiction of a writ of error filed by the petitioner in that court, by which it sought to have reviewed an order of the Circuit Court for the Southern District of New York adjudging the petitioner guilty of contempt. The facts are, that on August 3, 1900, the Westinghouse Airbrake Company filed in the Circuit Court its bill of complaint, alleging the ownership of certain letters patent, an infringement by this petitioner, and praying an injunction restraining such infringement and an accounting of profits and damages. A preliminary injunction was ordered on October 18, 1901. On February 24, 1903, the petitioner was adjudged guilty of contempt in disobeying that injunction, and ordered to pay a fine of $1,000, one-half to the United States and the other half to the complainant. On March 23, 1903, a writ of error to revise this order was allowed by the Circuit Court, and a full transcript of the proceedings in that court duly certified to the Circuit Court of Appeals. On March 18, 1903, the Circuit Court entered a decree sustaining the validity of the patent, directing a permanent injunction and an accounting of profits and damages. On April 16, 1903, an appeal was taken from this decree. A hearing on the writ of error was had before the Circuit Court of Appeals and, on February 13, 1904, that court dismissed the writ of error.

Mr. Chief Justice Fuller delivered the opinion of the Court:

The examination in *Bessette* v. *W. B. Conkey Company*, just decided, of the right of review in contempt cases precludes the necessity of extended discussion.

In that case Bessette was not a party to the suit, and the controversy had been settled by a final decree, from which, so far as appeared, no appeal had been taken. He was found guilty of contempt of court, and a fine of $250 imposed, payable to the United States, with costs.

In this case the Christensen Engineering Company was a party. The contempt was disobedience of a preliminary injunction and the judgment

in contempt was intermediate the preliminary injunction and the decree making it permanent. The fine was payable, one-half to the United States, and the other half to the complainant.

The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in Bessette's case, and disclosed by some of the cases referred to in the opinion.

In *New Orleans* v. *Steamship Company*, 20 Wall. 387, the act in contempt was by one not then a party to the suit. No order was entered against him until the final decree in the case, and then he was punished for the act of disobedience, purely as an act of a criminal nature, and without compensation to the plaintiff in whose favor the injunction was originally ordered. No review under the then existing law was allowable. In *Hayes* v. *Fischer*, 102 U. S. 121, the contempt proceeding was remedial and compensatory, and the entire amount of the fine was ordered paid to the plaintiff in reimbursement. It was held that, if the remedial feature was alone to be considered, and the proceeding regarded as a part of the suit, it could not be brought to this court by writ of error, but could only be corrected on appeal from the final decree; if to be regarded as a criminal action, then it was one of which this court had no jurisdiction, either by writ of error or appeal. In *Ex parte Debs et al.*, 159 U. S. 251, there was nothing of a remedial or compensatory nature. No fine was imposed, but only a sentence of imprisonment. This court had no jurisdiction of a writ of error in such a case. And see *O'Neal* v. *United States*, 190 U. S. 36. In *Worden* v. *Searls*, 121 U. S. 14, the proceeding was remedial and compensatory, in that for violations of a preliminary injunction the defendants were ordered to pay the plaintiff $250 "as a fine for said violation," by one order, and, by another order, to pay a fine of $1,182 to the clerk, to be paid over by him to the plaintiff for "damages and costs," the $1,182 being made up of $682 profits made by the infringement, and $500 expenses of plaintiff in the contempt proceedings. These interlocutory orders were reviewed by this court on appeal from the final decree, and as that decree was reversed, the orders were also set aside, this being done "without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders, by a proper proceeding." It was also said "that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses."

These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be re-

garded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction.

Petitioner entitled to mandamus.

True copy.

Test:

Clerk Supreme Court, U. S.